

# MONTANA WATER PLAN

## Management Section

**FINAL**

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### Subsection: Federal Hydropower Licensing and State Water Rights

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## INTRODUCTION

Since 1920, the Federal Power Act (FPA) (16 USC 791(1982)) has required the Federal Energy Regulatory Commission (FERC) to license any hydropower project that: (1) is located on federal land; (2) uses water impounded by a federal dam; (3) is located in, or uses water from a navigable stream; or (4) produces power which affects interstate commerce. Following the U.S. Supreme Court decision in First Iowa Hydro-Electric Cooperative v. Federal Power Commission, 328 U.S. 152 (1946), FERC is not bound by state laws or policy in determining the number and location of hydropower projects it may license within a state. Not only does FERC's authority to site hydropower dams preempt all state decision-making on the issue, but FERC contends it is not required to consider Montana's water law system of prior appropriation. This relationship between FERC and the state has frustrated the state's attempt to manage its water resources by: (1) not allowing the state to optimize water use when a hydropower project virtually forecloses all future upstream uses; and (2) eroding the state's authority to control the allocation and use of its water.

## BACKGROUND

In 1920, when almost one-third of the United States' energy needs were supplied by hydropower, Congress enacted the Federal Water Power Act in response to fears that the hydropower industry could be concentrated in the hands of a few major power companies. The law was amended in 1935 to become the Federal Power Act (FPA) and is administered by the Federal Energy Regulatory Commission. In passing the FPA, Congress seemed to create a balance between state and federal governments in authorizing hydropower projects. The FPA required a license from FERC, but also provided for the application of state water law. However, in its First Iowa decision, the U.S. Supreme Court held that a hydropower project could be federally licensed even though the applicant was in violation of Iowa laws that required a state permit to build a dam and prohibited the dewatering of a stream. The Court's decision was based on grounds that a state license, as a condition precedent to federal action, would: (1) give the states veto power over projects that Congress intended FERC to regulate; (2) allow the states to control the comprehensive planning that congress entrusted to FERC; (3) result in a duplicate system of federal and state licensing that would be unworkable; and (4) make FERC the agent of the states for purposes of enforcing state laws.

Based on First Iowa and subsequent decisions, FERC's position is clear: an applicant for a federal hydropower license does not have to acquire a state water right prior to issuance of the license. In addition, the license may contain a special article allowing additional time to acquire the state water rights necessary to operate the project. If a federal license is issued, the licensee acquires the federal power of eminent domain and may condemn existing rights to acquire water for the project, provided that the right-holder is compensated. Thus, a FERC licensee can be inserted into the water rights system without ever having to comply with state water laws.

The Montana Constitution provides that all waters in the state are the property of the state for the use of its people and are subject to appropriation as provided by law for all beneficial uses, including hydropower. Since passage of the Montana Water Use Act of 1973, an appropriation of water requires a permit from the Department of Natural Resources and Conservation. Disruption of this appropriation system of water rights is only the most obvious and fundamental effect for FERC's disregard of state policies, procedures, and laws. Under the provisions of the Federal Fish and Wildlife Coordination Act and the Electric Consumers Protection Act, FERC must consult with state and federal fish and wildlife agencies when considering the issuance of a federal license (or exemption from licensing) for a proposed hydropower project. In many instances, this consultation leads to the imposition of minimum instream flow requirements on a project's federal license, often in disregard of state water law. Another problem centers on the fact that some hydropower projects may require a large share of the available flow at a certain point on a river. If FERC licenses a project and hasn't fully considered the range of state water management objectives, it may foreclose future agricultural, municipal, and other consumptive water uses upstream from the licensed project.

As demand increases for Montana's limited water supplies, the role of the state in controlling the allocation and management of this resource becomes more critical. Because of its knowledge of existing water use and water availability, the state is in the best position to exercise water management authority, but is frustrated by asserted federal preemption of this authority in regard to FERC hydropower licensing. Therefore, the state wishes to: (1) assure that FERC licensing and relicensing decisions are consistent with state resource management decisions, including the appropriation of water, the siting of hydropower and associated facilities, protection of fish and wildlife, and maintenance of water quality; (2) maximize

state influence on hydropower development in Montana while acknowledging a federal interest in coordinating such development throughout the region; (3) assure that FERC decisions comply with Montana's comprehensive water plans; and (4) guarantee that Montana's water rights system is fully considered in FERC decisions regarding water allocation.

## STATE WATER PLAN POLICY STATEMENT

Montana must seek to maximize control over the management of its water resources in matters pertaining to the siting of hydropower generating facilities. Water management agencies as well as hydropower producers in Montana should, to the extent possible, pursue development of common positions when dealing with FERC and matters involving changes to the Federal Power Act.

## ISSUE AND RECOMMENDATIONS

### Issue

FERC decisions on the licensing of hydropower projects fail to reflect Montana's statutory prerogatives concerning the allocation and management of the state's water resources.

### Recommendations

A two-pronged approach for dealing with FERC and the federal process for licensing hydropower projects is recommended.

The first recommendation is to work within the federal hydropower licensing system to influence FERC decisions on the siting and operation of hydropower projects in Montana. This recommendation would entail a state consultation process that includes all concerned agencies and groups, and the hydropower developers. Under this process, applicants for a federal hydropower license would be advised of all state requirements regarding fish and wildlife effects, water quality certification, environmental im-

pacts, water use permits, facility siting, and state water management goals. In addition, the consultation process would facilitate the project's review by state agencies and minimize the conflicts when the application is submitted to FERC. Under this process, holders of existing hydropower licenses and other interested agencies and groups could also seek mutually acceptable means of resolving problems surrounding current operating facilities. Key among the issues that might be involved are fishery enhancement or upstream water development.

Through this approach, state agencies and the hydropower producers would work on the issues surrounding a project and the means to resolve any problems. In turn, it is expected that FERC would accept the conclusions of the Montana consultation process and condition the license accordingly. The process would be defined under the state water plan as the comprehensive analysis that will be submitted to FERC for consideration as required under the Electric Consumer's Protection Act. Each analysis could also be used for interventions in federal hydropower licensing proceedings.

The second recommendation is to pursue statutory changes to the federal hydropower licensing system to maximize state-level control over the allocation and management of Montana's waters. This would largely focus on amending the Federal Power Act. Potential amendments would: assure consultation of state agencies charged with energy facility siting; allow states to collect fees from hydropower license applicants in order to study the impacts of proposed projects; require FERC to defer to state water plans, unless there is an overriding national interest; ensure fish and wildlife protections as provided by the Electric Consumer's Protection Act are sustained; make compliance with state water law a condition of a federal hydropower license; and provide that a water right for a hydropower project can be obtained only in accordance with state law. Another proposed amendment would abolish or limit FERC's authority to license hydropower projects and correspondingly increase state-level authority.

As a final element of this option, the state would seek to change the federal licensing system by supporting litigation that has the potential to overturn the First Iowa decision of the U.S. Supreme Court.

## PLAN IMPLEMENTATION

### Legislative Action

No state legislative action is required.

### Administrative Action

A hydropower coordinating committee will be established to facilitate the recommended consultation process, and to develop and review proposals to amend the Federal Power Act or overturn the First Iowa decision. The

committee will be composed of representatives of water management agencies, hydropower producers, and key public interest groups.

### Financial Requirements and Funding Strategies

It is anticipated that the proposed administrative actions can be accommodated under current-level funding for the state water planning program. If new, detailed information is needed to intervene in a federal licensing proceeding, additional costs might be incurred.

#### Time Schedule

Activity	Responsibility	Deadline
A. Development and Implementation Tasks		
1. Establish coordinating committee (CC)	DNRC	March 1989
2. Develop state consultation process	DNRC and CC	June 1989
3. Define SWP process to analyze proposed hydropower projects	DNRC	September 1989
B. Ongoing Tasks		
1. Monitor FERC licensing activities	DNRC	
2. Intervene in FERC licensing proceedings	DNRC and CC	
3. Promote negotiations with appropriate hydropower licensees	DNRC	
4. Review proposed amendments to FPA for adequacy	DNRC	
5. Monitor congressional actions relating to FERC	DNRC	
6. Monitor all litigation related to FERC and state water management	DNRC	